

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

HANDBOOK FOR MEDIATION

WHAT IS MEDIATION. Mediation is a process in which an impartial person, the mediator, facilitates communication between disputing parties to promote understanding, reconciliation and settlement.

Characteristically, mediation is assisted negotiation. The trained mediator keeps order in the session and is an advocate for settlement. He or she acts as a catalyst for dispute resolution by asking questions, helping define issues, opening channels of communication, and assisting in the generation and evaluation of alternative settlement proposals or solutions. The mediator is not a judge or arbitrator and has no authority to render any decision or to force a settlement.

Working with the mediator, counsel, in their role as negotiators, advise, support, and protect their client in negotiating and problem solving. By emphasizing the long term interests of the parties, the process allows the parties to retain control over their own dispute. The parties themselves are responsible for and participate in the resolution of their dispute.

PURPOSE OF MEDIATION IN THE WESTERN DISTRICT OF OKLAHOMA. As recommended by this Court's Civil Justice Reform Act Advisory Group composed of local members of the bar and lay persons, the Court adopted a Civil Justice Expense and Delay Reduction Plan which added a mediation program to augment the Court's existing ADR procedures. Although available at any stage in the litigation, it was recommended to be and **is intended to be a mechanism for the especially early resolution of civil cases.** Focusing on the **interests of the parties** is particularly important for early resolution before legal positions harden.

In our Court, mediation is available for virtually any case or any portion of a case. It should be held at "the earliest practical time" when sufficient discovery has been completed that would permit accurate case evaluation but preferably before dispositive motions and before the completion of all discovery needed to prepare for trial. It is a cost reduction measure. The Local Rules (LCvR16.3, LCvR16.3 Supp. §3.1 Mediation) govern this program. You may also refer to *Resolving Disputes in Federal Court - Alternatives and Options for Civil Cases*.

REFERRAL TO MEDIATION. Any party may request mediation in their Status Report filed pursuant to Local Court Rule 16.1 or at the Status/Scheduling Conference itself. Additionally, counsel may request it at any time and the Court may order it as well. When a case is referred, the Scheduling Order or other Order of Referral will set a window of time by which the mediation session is to be held. Please note that any referral to mediation shall not delay or stay any other deadline or proceeding unless the Court so orders.

The "window" allows parties and the mediator some flexibility for finding a convenient date and is intended to assist counsel with achieving a discovery plan appropriate for completing that early discovery necessary for all parties to evaluate the merits of the case.

WHO ARE THE PANEL MEDIATORS. Mediators on our panel have been approved by the Judges of the Court after review and recommendation of The ADR Advisory Committee, a court appointed committee knowledgeable about ADR and mediation. The mediators are attorneys and professionals who satisfy the training and experience requirements and are approved by the Court. Non panel neutrals may also be chosen by the parties.

SELECTING THE MEDIATOR. The Panel list is available at the Court's website at www.okwd.uscourts.gov. If counsel wish to know more about a prospective mediator, a book/file with each mediator's qualifications (areas of experience, short resume, references and fee schedule) is available in the Court Clerk's office..

Counsel are expected to timely select a mediator of their choice and make arrangements for the mediation session with the chosen mediator. An alternate choice may be needed in the event of a conflict of interest. Mediators are trained neutrals and should ask for names of all counsel, parties, their insurers, etc. to ensure no conflict of interest or any bias or prejudice. If no such selection is made within the necessary time, the ADR Administrator shall make the selection.

COMPENSATION OF MEDIATORS. Mediators may set reasonable fees as determined by the mediator and the parties. Fee schedules are available in the Clerk's Office, on the panel list or by calling the mediator. These fees are to be born equally by all the parties unless otherwise agreed to by counsel. The Court is mindful of the need for pro bono mediation in some cases and would encourage the discussion of reduced fees in appropriate cases and authorizes such discourse between counsel and mediators.

The Court expects the mediator to be paid promptly and appropriately with respect to each mediation session held. The Court has reserved the right to review the reasonableness of fees if that should ever be necessary and, if settlement is not accomplished by mediation and the case is later concluded by trial or otherwise, the prevailing party, upon motion, may recover as costs the fees paid to the mediator.

SCHEDULING THE MEDIATION SESSION. Once the referral is made, the mediator is selected by the parties with a convenient date, place and time agreed to by the parties and the mediator and that information is submitted to the Mediation Staff on the appropriate form - the Selection and Arrangements, - a proposed Order for Appointment is filed and the mediator is appointed and the mediation session date set. **It is the responsibility of both counsel to select the mediator, arrange for the mediation and timely submit the Selection and proposed Order to the Court.**

Sessions may be held at any suitable location agreeable to the mediator and the parties or held in available court space. Typically sessions will be held in the office of the mediator or of one of the counsel or other convenient location with consideration given to cost and time of travel involved. Space is available at the U.S. Courthouse if arrangements are timely made with the ADR Administrator.

The Court expects counsel and parties to be mindful of the mediator's schedule. Since mediators are busy attorneys and professionals, it is suggested that any cancellation or continuance of a session be one of necessity. Mediators may only continue cases within the time window ordered by the Court. Any other requests beyond that time must be to the Court. Any request for withdrawal from mediation should be at least 10 days prior to the scheduled session to give the mediator adequate notice. Any settlement prior to a scheduled session must be immediately reported to the mediator and the Court.

ATTENDANCE REQUIREMENTS. As with all our other dispute resolution programs, attendance at the mediation session is required of lead counsel and the parties or representatives of the party with full settlement authority. This includes corporate representatives and necessary claims professionals. See LCvR16.3 Supp. § 3.3. Resolution through mediation can only be effective if the appropriate players with full settlement authority are present. Parties are to participate in good faith until a settlement is reached or an impasse is declared by the mediator.

THE MEDIATION SESSION. Three (3) days prior to the session, each party is to provide the mediator and all other parties a memorandum for mediation stating the name and role of each person expected to attend, identity of each person with full settlement authority and a concise 5 page summary of the parties' claims/defenses/counter-claims, etc., relief sought and contentions concerning liability and damages. This is not filed in the case but only intended to identify issues and educate the mediator.

The mediation process itself is intended to be informal in nature with the actual ebb and flow of the process structured by the mediator. During the process private rooms or offices are available for individual caucuses and conferences. Although mediation is an inherently flexible process, expect the mediator to hold a joint session to lay

the ground rules and hear statements of the case by each party then break out into separate caucuses. Mediation is private and confidential, a settlement procedure, and the caucus concept assists attorneys in managing the risk of disclosure yet allows the mediator to explore the strengths and weaknesses of each side and permits parties to ventilate or express private views they are not comfortable in disclosing directly to the other party. The legal as well as the business, economic, political and personal interests of the parties can be explored and a variety of alternative solutions and options can be examined. Ultimately the mediator guides the parties in formalizing a specific settlement agreement. There is sometimes no specific time set for a mediation - they often take as long as necessary or until the mediator declares an impasse. Some mediators do prefer to set time limitations.

CONCLUSION OF THE MEDIATION PROCESS. If the case settles at the mediation, counsel are required promptly to notify the Court (assigned judge), file the ADR Report by Parties and prepare and file the necessary closing papers. If certain issues or claims are settled and trial will not be necessary on those issues, counsel are expected to file the appropriate pleading. The mediator then submits a report to the Court indicating whether the case settled, settled in part or did not settle. For purposes of evaluation, participants in the mediation program may later be given evaluation forms.

ADVANTAGES OF MEDIATION.

For the Court: The dispute is resolved early, not on the eve of trial, allowing the Court to schedule other cases in the allotted time. Voluntary settlements usually do not need post trial enforcement or appeal and can resolve all outstanding issues between the parties. Docket management is better controlled. Even if a case is not fully settled, issues are narrowed and a better trial ensues. Attorneys and citizens are more satisfied with "the system."

For Attorneys: The process facilitates negotiation and creates an event at which both sides must negotiate in good faith. It assists a settlement which may be more favorable than expected trial results. It can accomplish the goal of the client without a disproportionate expenditure of costs and fees. Using mediation can provide more effective use of attorney's time (not hung up in expensive discovery procedures) and, if the case is not resolved, the mediator can assist in focusing the remaining discovery. Finally, it can increase the client's satisfaction with their attorney and the legal process.

For Clients and Litigants: The process allows them some management control over the resolution of their dispute and the ability to exert some informed, direct influence over the outcome of their dispute after observing the other attorney and other party. They can bargain through counsel for certain key elements, trade others, and make decisions that a court or jury could not. Business relationships can be maintained. The best offer of each party is usually on the table at some point and decisions can be made to stop expenditure of time and money so that life or further business pursuits can be resumed.

Any questions, comments or suggestions regarding the Mediation Program, please call:

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